

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Richard D. Anderson,
Petitioner,
V.

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

City of Minneapolis
Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Peter C. Erickson on January 27, 1992, at 1:30 p.m. in Courtroom 18, Office of Administrative Hearings, Suite 500, 310 Fourth Avenue South, Minneapolis, Minnesota 55415. Gayle Gaumer, Wilson Law Firm, Suite 504, 5101 Vernon Avenue, Edina, Minnesota 55436 appeared on behalf of the Petitioner, Richard D. Anderson. C. Lynne Fundingsland, Assistant City Attorney, A-1700 Hennepin County Government Center, 300 South Sixth Street, Minneapolis, Minnesota 55487-0170 appeared on behalf of the City of Minneapolis (hereinafter "the City"). The record closed on this matter on March 13, 1992, upon receipt of the last filing of the parties.

The City called Brian R. Isaacson, Director of the Personnel Service Division, Human Resources Department, City of Minneapolis and Janice M. Garber, Director of Administration of the Public Works Department, City of Minneapolis to testify in this matter. Petitioner testified on his own behalf.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision in this matter after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. parties should contact Gerald Bender to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue to be determined in this proceeding is whether the Petitioner is entitled to relief under Minn. Stat. 197.46 (Veterans Preference Act), and if so, what relief is appropriate.

Based on the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Notice of Hearing for this matter was served by U.S. Mail upon the City by the Department of Veterans Affairs. The Notice was mailed on December 20, 1991.

2. Petitioner served in the United States Army on active duty from November 8, 1955, to August 9, 1957. Petitioner received an honorable discharge from the U.S. Army. Respondent's Exhibit Q.

3. On October 8, 1962, Petitioner was hired by the City to the position of Junior Account Clerk. That position was renamed to Accounting Clerk I and Petitioner was certified to the newly named position. His seniority date remained October 8, 1962.

4. Petitioner was promoted to Accounting Clerk II on June 3, 1964, and promoted to Accounting Clerk Supervisor on May 30, 1966.

5. On September 30, 1968, Petitioner was promoted to the position of Accountant. That position held a civil service grade level of 9. That position was later renamed as Accountant II.

6. Petitioner took an unpaid leave of absence from the City to seek a determination on eligibility for disability benefits beginning September 17, 1979. The Petitioner was found to be disabled and eligible for benefits in April, 1980. The disability benefits received were made retroactive to September 17, 1979.

7. From September 17, 1979, to March 27, 1983, Petitioner received a disability pension from the Minneapolis Employees Retirement Fund (MERF). While Petitioner received this pension, he did not accrue sick leave, vacation time, or any other employee benefit.

8. On November 23, 1982, and December 8, 1982, Petitioner was examined by physicians who recommended that he be re-employed by the City. Exhibits I and 2. The City offered Petitioner the position of Accounting Clerk I. Petitioner returned to work on March 28, 1983, in that position. The Accounting Clerk I position paid a salary substantially less than the Accountant II position left by the Petitioner in 1979. Respondent's Exhibit D. The Accounting Clerk I position paid \$560.00 bi-weekly. The last disability payment to Petitioner totalled \$994.43 per month. Garber Testimony.

9. Petitioner executed a voluntary demotion form dated March 3, 1983, in which he requested that he be demoted from the position of Accountant to the position of Account Clerk I. Respondent's Exhibit C. The effect of this request was to make Petitioner available for the open position of Account Clerk I with the seniority date of September 8, 1962.

10. There is no evidence in the record that an Accounting Supervisor or

Accountant II position was available when Petitioner was certified as eligible to return to work.

11. Employees who receive disability benefits from the City are considered retired employees. Garber Testimony; see also, Respondent's Exhibit B ("former employee"). A leave of absence granted for disability application terminates when the payment of disability benefits is approved. Issacson Testimony.

12. Had Petitioner been offered and returned to an Accountant II position, his seniority date would have been the first day on the job after his return from the disability.

13. Petitioner was informed by an employee of MERF that failing to accept the voluntary demotion would result in a loss of seniority and any pension rights established with the City. Anderson Testimony.

14. At no time did the City advise the Petitioner of any right to a hearing under the Veterans Preference Act.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Veterans Affairs and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 197.481 and Minn. Stat. 14.50. The Notice of Hearing was proper in all respects and the Department has complied with all substantive and procedural aspects of law and rule.

2. The Minn. Stat. 197.46 states in pertinent part:

No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions of the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

3. Petitioner is a "veteran separated from the military service under honorable conditions" within the meaning of Minn. Stat. 197.447 and 197.46.

4. Petitioner ceased to be an employee of the City in April, 1980, retroactive to September 17, 1979.

5. Upon Petitioner's certification of eligibility for work, Petitioner held no employment status with the City.

6. The City was obligated by Minn. Stat. 422A.18, subd. 4, to return
Petitioner to a position "at a rate of salary not less than the amount of his
disability allowance ...". The City was not obligated to return Petitioner
to
his former employment.

7. Petitioner was not the holder of the position of Accountant with the City when the "voluntary demotion" was executed.

8. The City offered the "voluntary demotion" to the Petitioner for the purpose of allowing him to regain his seniority date back to his original date of employment with the City.

9. Petitioner was not removed from his position within the meaning of Minn. Stat. 197.46 under the facts of this case. Petitioner was not entitled to a hearing concerning his re-employment.

10. The City did not deny the Petitioner any rights under the Veterans Preference Act by failing to advise him of his rights under that Act.

11. Contested case proceedings brought under the Veterans Preference Act are not subject to a statute of limitations.

12. The foregoing Conclusions are arrived at for the reasons set forth in the following Memorandum, which is hereby incorporated into these Conclusions.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of the Department of Veterans Affairs DISMISS the petition of Richard D. Anderson for relief under the Veterans Preference Act.

Dated: April 13th, 1992.

PETER C. ERICKSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the Commissioner is required to serve his final decision on each party and the Administrative Law Judge by first class mail.

Reported: Taped (Tape No. 11661)

MEMORANDUM

Petitioner maintains that the City was obligated by the Veterans Preference Act to advise him of his right to a hearing upon removal from his position as Accountant with the City. At the time the "voluntary demotion" was executed, Petitioner was not an employee of the City. Petitioner was a former employee receiving a disability pension. The City was required by Minn. Stat. 422A.18, subd. 4 to re-employ Petitioner and the City did so. The only statutory obligation was that the salary of the position be comparable to the disability pension payments. There was no obligation on the City to re-employ Petitioner in his former position. The Account Clerk I salary was comparable to the pension payment and the City met its statutory obligation.

The "voluntary demotion" was a device used by the City to avoid the adverse impact on the employee of being rehired from disability status. By "demoting" Petitioner, the City could effectively ignore the period of time Petitioner had been on a disability pension. Petitioner was then treated as though he never left the City's employ. The net effect was that Petitioner had a seniority date which ran back to 1962. Had the City not used a "voluntary demotion," Petitioner would have had a seniority date of March 28, 1983. This would have put Petitioner at greater risk of layoff in the event of a reduction in force and would have affected his eligibility for a retirement pension.

The City argues that Petitioner's claims are barred by a statute of limitations. The Administrative Law Judge agrees with the reasoning presented in David L. Olson v. Otter Tail County, OAH Docket No 6-3100-5639-2 (Order issued February 28, 1992)(Finance and Commerce, March 6, 1992). In Olson, the Administrative Law Judge held that there are no statutes of limitation applicable to Veterans Preference Act cases. He also held that laches may be asserted where prejudice has been shown resulting from the claimant's delay. The City has shown no prejudice in this proceeding.

Petitioner voluntarily left his employment due to disability. At no time was Petitioner removed from his employment. He sought re-employment with the City. The City met its statutory obligation to re-employ Petitioner after he was certified fit. Petitioner agreed to execute a voluntary demotion to

protect his seniority date. The City was not obligated to use the "voluntary demotion" device to obtain that result. The City could have offered only re-employment at the Accounting Clerk I position, without backdating Petitioner's seniority. Petitioner was not entitled to a hearing over why he voluntarily executed a document surrendering a position he did not, at that time, hold. The Administrative Law Judge thus recommends that the Petitioner's request for relief be DISMISSED.

P.C.E.